(2)

No. 93-1889

Supreme Court, U.S.
FILED
JUN 27 1994
THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

AMERICAN EXPRESS BANK LTD.,

Petitioner,

—v.—

SHEERBONNET LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION

JACK P. LEVIN
Counsel of Record
DAVID W. HALLER
HOWARD, DARBY & LEVIN
1330 Avenue of the Americas
New York, New York 10019
(212) 841-1000

Attorney for Respondent
Sheerbonnet Ltd.

15 pp

TABLE OF CONTENTS

PAGE

Table of Authorities ii

Rule 29.1 Statement iv

Introduction 1

Reasons for Denying the Petition 2

I. American Express Bank Misrepresents the Pleaded Facts 2

II. Sheerbonnet Does Not Seek Declaratory Relief. This Case, Therefore, Does Not Present Issues Similar to Those Raised in *Granite State* 4

III. The Court of Appeals Reviewed the District Court's Decision for an Abuse of Discretion 5

IV. The "Reactive" or "Vexatious" Litigation Factor Considered In Certain *Colorado River* Cases Has No Legal or Factual Application Here 7

V. The Decision Below Does Not Constitute Final Judgment and There Are No Circumstances Favoring This Court's Interlocutory Review 9

Conclusion 10

TABLE OF AUTHORITIES

Cases	PAGE
Ankenbrandt v. Richards, 112 S. Ct. 2206 (1992)	2
Brillhart v. Excess Ins. Co. of America, 316 U.S. 491 (1942)	4
Burford v. Sun Oil Co., 319 U.S. 315 (1943) ...	1, 7, 8, 9, 10
Calvert Fire Ins. Co. v. American Mutual Reinsurance Co., 600 F.2d 1228 (7th Cir. 1979)	7n., 8
Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800 (1976).....	2, 4, 5, 7, 9, 10
Deakins v. Monaghan, 484 U.S. 193 (1988)	2
Fuller Co. v. Ramon I. Gil, Inc., 782 F.2d 306 (1st Cir. 1986).....	8n.
Granite State Ins. Co. v. Tandy Corp., 986 F. 2d 94 (5th Cir.), *cert. granted*, 113 S. Ct. 51 (1992), *cert. dismissed*, 113 S. Ct. 1836 (1993)	4, 5
Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916)	9
Interstate Material Corp. v. City of Chicago, 847 F.2d 1285 (7th Cir. 1988)	7n.
Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983)	2, 6
Nakash v. Marciano, 882 F.2d 1411 (9th Cir. 1989)...	8
New Orleans Public Serv., Inc. v. Council of New Orleans, 491 U.S. 350 (1989)	2, 6
Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987).....	2

PAGE

Sheerbonnet Ltd. v. American Express Bank Ltd., 17 F.3d 46 (2d Cir. 1994) ..... 6, 6n.

Telesco v. Telesco Fuel and Masons' Materials, Inc., 765 F.2d 356 (2d Cir. 1985)..... 8n.

University of Maryland v. Peat Marwick Main & Co., 923 F.2d 265 (3d Cir. 1991)..... 6

Villa Marina Yacht Sales, Inc. v. Hatteras Yachts, 947 F.2d 529 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 1674 (1992)..... 7

Statutes

28 U.S.C. § 2201 4

N.Y. Banking Law § 606(4)(a)..... 3

Miscellaneous

Charles A. Wright *et al.*, 17A *Federal Practice and Procedure* § 4247 (1988 & 1994 supp.)..... 5

RULE 29.1 STATEMENT

Pursuant to Supreme Court Rule 29.1, Respondent Sheerbonnet Ltd. states that it has no corporate parent, nor any subsidiaries (that are not wholly owned subsidiaries).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1889

AMERICAN EXPRESS BANK, LTD.,

Petitioner,

—v.—

SHEERBONNET LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION

INTRODUCTION

In this case, the United States Court of Appeals for the Second Circuit applied the law established by this Court's precedents to review and reverse the district court's decision to abstain. The decision below did not establish any new principle of law. Rather, it applied well-established principles to the unique facts of this case. Among other reasons, the court of appeals found an abuse of discretion by the district court because (1) there is no state policy affected by this case to warrant abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and (2) there is no parallel state court proceeding to

defer to under *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800 (1976).

In recent years, this Court has carefully defined the law of abstention, and related issues, in various contexts. *See, e.g., Ankenbrandt v. Richards*, 112 S. Ct. 2206 (1992); *New Orleans Public Serv., Inc. v. Council of New Orleans*, 491 U.S. 350 (1989); *Deakins v. Monaghan*, 484 U.S. 193 (1988); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983). The law in this area is well-settled.

The decision of the court of appeals, moreover, simply remanded the case to the district court for further proceedings. There is, therefore, no final judgment in this case. No circumstances exist to merit further review of this case at this time.

In its attempt to justify a writ of certiorari, Petitioner American Express Bank Ltd. has erected an edifice composed entirely of flawed elements.

REASONS FOR DENYING THE PETITION

I. American Express Bank Misstates the Pleaded Facts.

Since the decision below turned on a careful analysis of the very particular facts alleged in the pleadings in this case, it is necessary to correct Petitioner's misleading and erroneous statement of those facts.

Respondent Sheerbonnet Ltd. alleges that American Express Bank wrongfully "credited" Sheerbonnet's letter of credit funds to an account of BCCI when American Express Bank knew that BCCI's operations had been suspended and that by law BCCI could no longer accept deposits. The purported "credit" was temporary and illusory, and was intended solely to benefit American Express Bank.

American Express Bank's principal purpose was to assert an immediate right of set-off to the funds against debts BCCI owed to American Express Bank. American Express Bank retained Sheerbonnet's funds, and never transferred the funds to BCCI nor returned them to Sheerbonnet. Sheerbonnet, therefore, sued American Express Bank for conversion, tortious interference with contract and unjust enrichment, and seeking monetary damages for the injuries it suffered. Sheerbonnet has not sued BCCI and does not assert a claim in this case against BCCI's assets. American Express Bank, therefore, misleads when it asserts that Sheerbonnet's complaint is motivated by the fact that "BCCI never paid Sheerbonnet". American Express Bank Petition (the "Petition") at 4.

American Express Bank also misrepresents the nature and scope of the liquidation proceeding commenced in New York state court by the New York Superintendent of Banks (the "Superintendent"). According to American Express Bank, the New York liquidation proceeding was "designed to address and resolve the state law claim[s] presented" by Sheerbonnet. Petition at (i), 2. However, the New York Banking Law, and frequent pronouncements of the Superintendent, clearly state that liquidation proceedings involving foreign banks are designed only to hear "the claims of creditors of such [foreign banking] corporation arising out of transactions had by them with its New York agency or agencies." N.Y. Banking Law § 606(4)(a).

Sheerbonnet is not a creditor of BCCI's New York agency, and the New York agency had nothing to do with the wire transfer at issue in this case. Sheerbonnet, therefore, has not asserted a claim against the agency in the liquidation proceeding. Moreover, the Superintendent is aware of Sheerbonnet's federal court action against American Express Bank and has never asserted any interest in hearing Sheerbonnet's claims in the liquidation proceeding.

The factual foundation of American Express Bank's petition, therefore, is mislaid.

II. Sheerbonnet Does Not Seek Declaratory Relief. This Case, Therefore, Does Not Present Issues Similar to Those Raised in *Granite State*.

This Court's grant of a petition for a writ of certiorari in *Granite State Ins. Co. v. Tandy Corp.*, 986 F. 2d 94 (5th Cir.), *cert. granted*, 113 S. Ct. 51 (1992), *cert. dismissed*, 113 S. Ct. 1836 (1993) lends no support to American Express Bank's petition here. This case does not present the issues on which this Court granted certiorari in *Granite State*, and therefore cannot be the vehicle to answer the questions left open when this Court dismissed the writ in that case.

Granite State presented several appellate issues, all of which revolved around the fact that the federal court plaintiff in that case sued for a declaratory judgment. The principal question in *Granite State* was whether this Court's decision in *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491 (1942) survived this Court's more recent decision in *Colorado River*. *Brillhart* held that a federal district court should "ordinarily" decline to hear an action seeking declaratory relief when a there is a state court lawsuit between substantially the same parties raising substantially the same state law issues. *Brillhart*, 316 U.S. at 495. *Colorado River* later set out a general, more stringent, "exceptional circumstances" test outlining several factors to be considered when a federal court must decide whether to defer to parallel state court proceedings.

This Court's decision in *Colorado River* was based largely on the premise that abstention is "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Colorado River*, 424 U.S. at 813; *id.* at 820 ("We emphasize, however, that we do not overlook the heavy obligation to exercise jurisdiction."). In the declaratory judgment context, on the other hand, the jurisdiction of the federal district courts is discretionary. *See* 28 U.S.C. § 2201 ("any court of the United States, upon the filing of an appropriate pleading, *may* declare the rights and other legal

relations of any interested party seeking such declaration"). The question therefore arose as to whether the *Colorado River* "exceptional circumstances" test applies to declaratory judgment actions.

Numerous federal district courts and courts of appeals had taken varying positions on this question. *See generally* cases cited in Charles A. Wright et al., 17A *Federal Practice and Procedure* § 4247 n.5 (1988 & 1994 supp.); *Granite State*, 986 F.2d at 95 n.3. This Court, therefore, granted the petition for a writ of certiorari in *Granite State* to resolve the principal question: "Does the 'exceptional circumstances' test for federal abstention apply *to declaratory judgment actions*?" *See* Brief for Respondent at 1, in *Granite State* (No. 91-2086) (available on LEXIS). This Court was also petitioned to resolve the ancillary question of the appropriate standard of appellate review over district court decisions to dismiss or stay federal court actions seeking declaratory relief: "Should a trial court's decision to abstain *in a declaratory judgment action* be reviewed de novo or by an abuse of discretion standard?" *Id.*

Because Sheerbonnet's complaint seeks monetary damages, not a declaratory judgment, this Court's grant of a petition for a writ of certiorari in *Granite State*, gives no support for American Express Bank's petition here.

III. The Court of Appeals Reviewed the District Court's Decision for an Abuse of Discretion.

American Express Bank asserts that the court of appeals "articulated a hybrid plenary/abuse of discretion standard of appellate review, and exercised, in effect, a plenary or *de novo* standard . . . ." Petition at 3. In reality, the court of appeals articulated and applied precisely the appropriate standard:

> At the outset, we note that we review the decision to abstain for abuse of discretion. The underlying legal questions, however, are subject to plenary review.

Sheerbonnet Ltd. v. American Express Bank, Ltd., 17 F.3d 46, 48 (2d Cir. 1994).

This standard is drawn from, and is entirely consistent with, the precedents set by this Court. *See Moses H. Cone*, 460 U.S. at 19:

> Under both *Clavert* and *Colorado River*, of course, the decision whether to defer to the state courts is necessarily left to the discretion of the district court in the first instance. Yet to say that the district court has discretion is not to say that its decision is unreviewable; such discretion must be exercised under the relevant standards prescribed by this Court.

See also New Orleans, 491 U.S. at 359 ("[T]he federal court[ ]s [have] discretion in determining whether to grant certain types of relief . . . . We have carefully defined, however, the areas in which such "abstention" is permissible . . . .") (citations omitted). Other courts of appeals have applied similar standards. *See, e.g., University of Maryland v. Peat Marwick Main & Co.*, 923 F.2d 265, 269-70 (3d Cir. 1991).

American Express Bank does not support its contention that the court of appeals reviewed the district court's decision *de novo*, except by the mere fact that the district court's decision was reversed and the bald assertion that the court of appeals "substituted its judgment for that of the district court". Petition at 3. Because the court of appeals in this case applied an abuse of discretion standard, the conflict which American Express Bank claims that decision created "with the decisions of the vast majority of courts of appeals", Petition at 10, is a fiction.[1]

---

[1] In the court of appeals, American Express Bank itself invited *de novo* review by urging affirmance of the district court's decision to abstain

IV. The "Reactive" or "Vexatious" Litigation Factor Considered In Certain *Colorado River* Cases Has No Legal or Factual Application Here.

American Express Bank complains that the court of appeals did not sufficiently credit the district court's "finding" that Sheerbonnet "attempts to elevate form over substance by attempting to relabel its claims as tort claims against [American Express Bank]." Transcript of District Court Opinion, Petition Appendix D at 15a. This very claim demonstrates that Petitioner's quarrel is not with the legal standards applied by the court below but simply with the court's application of the appropriate standard to the particular facts of this case.

In any event, petitioner's complaint is incorrect. All of the cases cited by American Express Bank on this issue were decided under *Colorado River*; none of them applied the *Burford* abstention principles which the district court in this case purportedly relied upon.

Colorado River applies only when there are "parallel" or "concurrent" state and federal court actions involving substantially the same parties and substantially the same issues.[2] In determining whether the federal action should go forward, certain federal courts have considered whether the federal action was filed in reaction to, or was otherwise intended to disrupt, the state court action. *See, e.g., Villa Marina Yacht Sales, Inc. v. Hatteras Yachts*, 947 F.2d 529, 534 (1st Cir. 1991) (decision to sue in federal court stemmed from

---

based on *Colorado River. Sheerbonnet Ltd.*, 17 F.3d at 48. The district court had addressed only American Express Bank's *Burford* argument, and did not weigh any of the relevant *Colorado River* factors. Transcript of District Court Opinion, Petition, Appendix D.

[2] *See Interstate Material Corp. v. City of Chicago*, 847 F.2d 1285, 1288 (7th Cir. 1988) ("A suit is 'parallel' when substantially the same parties are contemporaneously litigating substantially the same issues in a another forum, thus making it likely that judgment in one suit will have a res judicata effect in the other suit.") (quoting *Calvert Fire Ins. Co. v. American Mutual Reinsurance Co.*, 600 F.2d 1228, 1229 n.1 (7th Cir. 1979)).

unsuccessful attempt by plaintiff to obtain a preliminary injunction in Commonwealth court), *cert. denied*, 112 S. Ct. 1674 (1992); *Nakash v. Marciano*, 882 F.2d 1411, 1413, 1417 (9th Cir. 1989) (defendant in state court, after three and one-half years, 70 hearings, 100 depositions and the production of 300,000 documents, filed an action in federal court seeking, among other things, a stay of the state court proceeding); *Calvert*, 600 F.2d at 1234 (federal suit for a declaratory judgment was a reactive measure initiated by a defendant in the state court action to delay that proceeding and postpone a final resolution).[3]

In this case there is no parallel state court action in which Sheerbonnet's tort and equity claims are being heard. Indeed, even if Sheerbonnet had attempted to present its claims in the liquidation proceeding, because of the limited authority granted by the New York Banking Law the liquidation court would likely have refused to hear them.

Moreover, no case cited by American Express Bank ever "found", as the district court apparently did here, that claims asserted against one party (American Express Bank) were in reality claims asserted against a different, unnamed party (BCCI). This determination was itself a clear abuse of discretion.

By contrast, the district court made none of the findings required to abstain under *Burford*. The district court did not make any determination that Sheerbonnet's lawsuit against

---

[3] *See also Fuller Co. v. Ramon I. Gil, Inc.*, 782 F.2d 306, 309-10 (1st Cir. 1986) ("In our view, it would be unthinkable that every time a state . . . court defendant became dissatisfied with that court's provisional resolution of some issue . . . it could rush over to the federal courthouse in the hope of obtaining a more favorable determination."); *Telesco v. Telesco Fuel and Masons' Materials, Inc.*, 765 F.2d 356, 363 (2d Cir. 1985) ("The sequence of events in this case shows that the same party is plaintiff in both courts and sues in the federal court on the same cause of action after he has suffered some failures in the earlier state court action.").

American Express Bank implicates a substantial state policy, or that this action threatens to interfere with the liquidation proceeding. Nor did the district court determine that the state court managing the liquidation proceeding would actually entertain on the merits the claims Sheerbonnet has made here. Therefore, without a parallel state court action to defer to under *Colorado River*, and without adequate district court findings on the *Burford* issues, there is no mortar to cement together American Express Bank's varied arguments.

V. The Decision Below Does Not Constitute Final Judgment and There Are No Circumstances Favoring This Court's Interlocutory Review.

The decision of the court of appeals remands the case to the district court for further proceedings. This Court should not take the uncommon step of granting American Express Bank's petition for interlocutory review of this ordinary case. *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

CONCLUSION

The only question presented by this case is whether the court of appeals, in applying the appropriate standards for abstention under *Burford* and *Colorado River*, came to the proper conclusion. Such an unexceptional decision does not warrant this Court's attention.

Dated: June 27, 1994

Respectfully submitted,

JACK P. LEVIN
HOWARD, DARBY & LEVIN
1330 Avenue of the Americas
New York, New York 10019
(212) 841-1000

Attorneys for Respondent Sheerbonnet Ltd.

Of Counsel:

DAVID W. HALLER